



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JUAN GABRIEL COVARRUBIAS,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

) Cr. No. 09-1748GT

) Cv. No. 10-0561GT

) **ORDER**

On March 15, 2010, Petitioner, Juan Gabriel Covarrubias ("Mr. Covarrubias"), filed a Motion to Modify Sentence, presumably pursuant to 28 U.S.C. § 2255. Mr. Covarrubias requests a two level downward departure based on his status as a deportable alien, which Mr. Covarrubias asserts "should have been considered as a mitigating factor" at his sentencing. The Court has fully considered this matter, including a review of Mr. Covarrubias's brief filed, the authorities cited therein and the arguments presented. For the reasons stated below, Mr. Covarrubias's Motion to Modify Sentence is **DENIED**.

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1 First, Mr. Covarrubias pled guilty, pursuant to a written plea agreement, to one count of
 2 Deported Alien Found in the United States, in violation of 8 U.S.C. § 1326. In the written plea
 3 agreement, Mr. Covarrubias explicitly waived his right to appeal and/or collaterally attack his
 4 conviction or sentence. The Ninth Circuit has long acknowledged that the terms of a plea
 5 agreement are enforceable. *See, United States v. Baramdyka*, 95 F.3d 840, 843 (9th Cir. 1996),
 6 *cert. denied*, 117 S.Ct. 1282 (1997). Since Mr. Covarrubias expressly waived his statutory right
 7 to appeal or collaterally attack his sentence in his plea agreement, Mr. Covarrubias is now
 8 precluded from challenging that sentence pursuant to 28 U.S.C. § 2255. *See, United States v.*
 9 *Abarca*, 985 F.2d 1012, 1014 (9th Cir. 1993) (holding that a knowing and voluntary waiver of a
 10 statutory right is enforceable).

11 Moreover, even if Mr. Covarrubias had not expressly waived his right to appeal or
 12 collaterally attack his sentence, his petition would still fail. In essence, Mr. Covarrubias argues
 13 that because of his status as a deportable alien, he is "ineligible[] for pre-release custody and
 14 minimum security confinement." Mr. Covarrubias argues that the Court should grant him a two
 15 level downward departure because of his status. However, Mr. Covarrubias's argument that the
 16 Court should depart downward because he is a deportable alien is precluded by statute and
 17 current Ninth Circuit case law. By statute, the Court may depart downward only if there are
 18 "aggravating or mitigating circumstances . . . not adequately taken into consideration by the
 19 Sentencing Commission." 18 U.S.C. § 3553(b). Specifically, the Ninth Circuit has held that
 20 the threat of deportation is not a factor that the district court may consider for sentencing
 21 purposes. *United States v. Alvarez-Cardenas*, 902 F.2d 734, 737 (9th Cir. 1990).¹ Accordingly,

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 26 ¹ The Ninth Circuit decided, in an unpublished opinion, that the defendant, like Mr.
 27 Covarrubias, was not entitled to a six month reduction in his sentence under 18 U.S.C. §
 28 3553(b) because as a deportable alien he is not eligible to spend the last six months of his
 sentence in a half way house pursuant to 18 U.S.C. § 3624(c). *See United States v. Zepeda-*
Valles, 87 F.3d 1325 (9th Cir. 1996).

1 **IT IS ORDERED** that Mr. Covarrubias's Motion to Modify Sentence is **DENIED**.

2 **IT IS SO ORDERED.**

3
4 8-10-11

5 date

6 
GORDON THOMPSON, JR.
United States District Judge

7 cc: AUSA Bruce Castetter